

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BENJAMIN H. ELLEGOOD, JR.,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 01-25-SLR
)	
RAPHAEL WILLIAMS, Warden,)	
ROBERT SNYDER, Warden and)	
ATTORNEY GENERAL of the)	
STATE of DELAWARE,)	
)	
Respondents.)	

MEMORANDUM ORDER

I. INTRODUCTION

Currently before the court is petitioner Benjamin H. Ellegood, Jr.'s application for pre-trial relief under 28 U.S.C. § 2241. Because it is without merit, the court shall deny petitioner's application.

II. BACKGROUND

On September 12, 2000, petitioner was arrested on charges of second degree robbery and terroristic threatening. At a preliminary hearing on September 21, 2000, the Delaware Court of Common Pleas dismissed the charges and petitioner was discharged. On October 10, 2000, a Delaware grand jury indicted petitioner on charges of attempted first degree robbery, second degree robbery and terroristic threatening. On December 20, 2000, petitioner, arrested and committed in

default of bail, applied for state habeas corpus relief on the ground that the dismissal of the charges at the preliminary hearing precluded his subsequent indictment. The Superior Court summarily denied the petition, and petitioner did not appeal the decision. On December 28, 2000, petitioner filed the instant application.

On March 5, 2001, pursuant to a plea agreement, petitioner pled guilty to misdemeanor theft, a lesser included offense of second degree robbery and terroristic threatening. The attempted first degree robbery charge was dropped, and petitioner was sentenced to two years imprisonment, suspended after time served for the balance of the term on probation. The same day, petitioner filed a handwritten notice of appeal to the Delaware Supreme Court, dated February 27, 2001. Petitioner's attorney filed a formal notice on March 16, 2001. On June 26, 2001, the Delaware Supreme Court held that: (1) pursuant to Superior Court Criminal Rule 5.1(b), petitioner's indictment after the dismissal of the same charges at a preliminary hearing was proper; (2) petitioner's challenge to the charge of attempted first degree robbery was without merit; and (3) because petitioner's claim for ineffective assistance of counsel was not raised previously, it would not

be considered on direct appeal. See Ellegood v. State, No. 104, 2001 WL 770264 (Del. June 26, 2001).

III. DISCUSSION

A prisoner must fully exhaust all remedies in state court before a district court may entertain his claims in a federal habeas corpus appeal, even if the prisoner is seeking pre-trial relief under 28 U.S.C. § 2241. See Moore v. DeYoung, 515 F.2d 437, 442-443 (3d Cir. 1975). To exhaust state remedies, a petitioner must have raised the factual and legal premises behind his claims for relief to each level of the state courts before proceeding to federal court. See Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). This exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state court convictions and preserves the role of state courts in protecting federal rights. See Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir. 1992). Although petitioner filed the instant application prior to presenting his claim to the Delaware Supreme Court, because the Supreme Court has since addressed petitioner's claim and respondents have expressly waived the exhaustion requirement, the court will consider the merits of petitioner's application. See Evans v. Ct. of Common Pleas, Del. County, Pa., 959 F.2d 1227, 1231 (3d Cir.

1992) ("Exhaustion is not a jurisdictional requirement, but rather a rule of comity, and a federal court may in certain circumstances decide the merits of a claim despite non-exhaustion.").

Petitioner argues that his sentence, based on charges that were previously dismissed at a preliminary hearing, is illegal. The court finds that petitioner's claim is without merit pursuant to Delaware Superior Court Criminal Rule 5.1(b), which states that the dismissal of a criminal charge at a preliminary hearing "shall not preclude the state from instituting a subsequent prosecution for the same offense." See also Fed. R. Crim. P. 5.1(b).

IV. CONCLUSION

Therefore, at Wilmington, this 27th day of August, 2001;

IT IS ORDERED that:

1. Petitioner's application for pre-trial relief pursuant to 28 U.S.C. § 2241 (D.I. 2) is dismissed and the writ denied.
2. Petitioner's motions for appointment of counsel (D.I. 3, 8) are denied as moot.
3. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a

certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3d Cir. Local Appellate Rule 22.2 (1998).

United States District Judge